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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WEBOOST MEDIA S.R.L., a Societa a) Case No.: 3:13-cv-05304 SC
responsabilita limitata,)
Plaintiffs,) **DEFENDANT'S REPLY IN**
v.) **SUPPORT OF MOTION TO**
LOOKSMART LTD., a Delaware) **DISMISS OR IN THE**
corporation, and DOES 1 through 100,) **ALTERNATIVE FOR PARTIAL**
Defendants.) **SUMMARY JUDGMENT**
Date: February 7, 2014
Time: 10:00 a.m.
Location: 450 Golden Gate Avenue,
Courtroom 1, 17th Floor
San Francisco, CA 94102

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I. INTRODUCTION

Plaintiff WEBOOST MEDIA S.R.L. (“WeBoost”) admits that the Contract attached to its complaint, including the limitation of liability therein, is the express bargain made between it and LOOKSMART LTD. (“LookSmart”), two sophisticated business entities. Further, WeBoost concedes that its Contract with LookSmart does not affect any public interest. Opp. 6:19. Nonetheless, it contends that Cal. Civ. Code § 1668 nullifies the express bargained for terms of the Contract and permits it to state claims for fraud and other intentional torts, and to seek damages beyond the limitation of liability. WeBoost claims that the Contract does not eliminate its right to pursue tort claims, but only limits “recovery of damages, regardless of which cause of action gives rise to such damages.” Opp. 4:3. Additionally, WeBoost claims that this Court cannot limit its recovery because “a motion to dismiss is not the proper mechanism for attempting to limit [its] damages.” Opp. 8:14.

WeBoost is incorrect as a matter of fact and law. Numerous cases have held that sophisticated parties can reach a bargain that expressly allocates the risk of misrepresentations, including fraudulent misrepresentations. Under California law, Cal. Civ. Code § 1668 does not nullify those agreements if the economic loss rule applies. The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless it can demonstrate harm above and beyond a broken contractual promise. WeBoost has not demonstrated harm above and beyond a broken contractual promise, nor even alleged such harm. Moreover, LookSmart did ask the Court to limit WeBoost's recovery through a partial summary judgment order and WeBoost has not opposed or addressed that request.

1 Accordingly, by this motion LookSmart seeks to dismiss with prejudice
2 WeBoost's causes of action for Breach of the Covenant of Good Faith and Fair
3 Dealing, Fraudulent Concealment, Negligent Interference With Prospective
4 Economic Advantage, Intentional Interference With Prospective Economic
5 Advantage, Intentional Interference With Contractual Relations and Violation of
6 Cal. Bus. & Prof. Code § 17200. Further, LookSmart seeks a partial summary
7 judgment Order limiting the parties' liability to the total amount WeBoost paid
8 LookSmart under the contract.

9 **II. *FOOD SAFETY NET SERVICES V. ECO SAFE SYSTEMS USA***
10 **ADDRESSES AND REJECTS ALL OF THE ARGUMENTS MADE**
11 **BY PLAINTIFF IN ITS OPPOSITION**

12 LookSmart cited *Food Safety Net Services v. Eco Safe Systems USA* (2012)
13 209 Cal.App.4th 1118 in its moving papers and WeBoost did not address it in
14 opposing this motion.

15 As here, *Food Safety* involved a commercial contract¹ entered into between
16 two sophisticated business entities. Food Safety Net Services ("Food Safety") was
17 retained to perform a study of Eco Safe Systems USA, Inc.'s ("Eco Safe") food
18 disinfection equipment. Food Safety made an offer to complete the study and
19 provided Eco Safe with its standard form contract that included the following
20 limitation of liability in the contract:

21 IN NO EVENT SHALL [FOOD SAFETY] BE LIABLE FOR
22 INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL
23 DAMAGES INCLUDING (BUT NOT LIMITED TO) DAMAGES
24 FOR LOSS OF PROFIT OR GOODWILL REGARDLESS OF (A)

25 ¹ The Food Safety contract was its written form contract that was accepted by Eco Safe and was
26 attached to the complaint. Just as the Contract here was LookSmart's written form contract and
27 is attached to the complaint.

1 THE NEGLIGENCE (EITHER SOLE OR CONCURRENT) OF
2 [FOOD SAFETY] AND (B) WHETHER [FOOD SAFETY] HAS
3 BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES
4 [Food Safety's] total liability to you in connection with the work
5 herein covered for any and all injuries, losses, expenses, demands,
6 claims or damages whatsoever arising out of or in any way related to
7 the work herein covered, from any cause or causes, shall not exceed
8 an amount equal to the lesser of (a) damages suffered by you as the
9 direct result thereof, or (b) the total amount paid by you to [Food
10 Safety] for the services herein covered².

11 *Id.* at 1125.

12 Despite the agreed upon limitation of liability, Eco Safe sued Food Safety
13 for breach of contract, negligence, fraud, and breach of the covenant of good faith
14 and fair dealing.³ The Superior Court granted summary judgment for Food Safety
15 based upon the contractual limitation of liability.

16
17 ² *Food Safety's* limiting language is functionally identical to the language agreed to by Weboost
and LookSmart which was in relevant part as follow:

18 (I) UNDER NO CIRCUMSTANCES WILL EITHER PARTY BE LIABLE
19 TO THE OTHER PARTY, WHETHER IN CONTRACT, TORT OR
20 OTHERWISE, FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL,
21 SPECIAL OR EXEMPLARY DAMAGES (EVEN IF SUCH DAMAGES
22 ARE FORSEABLE AND WHETHER OR NOT THE INDEMNIFIED
23 PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH
24 DAMAGES) ARISING FROM THIS AGREEMENT AND (II)
NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR
MORE THAN THE TOTAL AMOUNT PAID OR PAYABLE (PLUS
APPLICABLE FEES AND COSTS) TO LOOKSMART UNDER THIS
AGREEMENT. *See* Complaint Ex. A, Pg. 2.

25 ³ Weboost has sued LookSmart for very similar claims of Breach of Contract, Breach of
26 the Covenant of Good Faith and Fair Dealing, Fraudulent Concealment, Negligent Interference
27 With Prospective Economic Advantage, Intentional Interference With Prospective Economic
Advantage, Intentional Interference With Contractual Relations and Violation of Cal. Bus. &

1 The Court of Appeal held that, Cal. Civ. Code § 1668 notwithstanding, the
2 limitation of liability clause prevented recovery of damages under breach of the
3 covenant of good faith and fair dealing, and negligence. The Court of Appeal cited
4 to *McCarn v. Pacific Bell Directory* (1992) 3 Cal.App.4th 173 in support of that
5 finding. (*McCarn* was discussed extensively in LookSmart's moving papers).
6 *Food Safety Net Services* 209 Cal.App.4th at 1127. Based upon these rulings, this
7 Court should also hold that the Contract's limitation of liability clause at issue here
8 prevents recovery of damages under WeBoost's claims for breach of the covenant
9 of good faith and fair dealing and negligent interference with prospective economic
10 advantage⁴ despite Cal. Civ. Code § 1668.

11 Additionally, the *Food Safety* Court found that Cal. Civ. Code § 1668 did
12 not save "Eco Safe's claims for fraud and deceit [which] failed in light of the
13 economic loss rule." *Id.* at 1130. Quoting the California Supreme Court, the
14 *Food Safety* Court explained that:

15 "the economic loss rule provides: ' "[W]here a purchaser's
16 expectations in a sale are frustrated because the product he
17 bought is not working properly, his remedy is said to be in
18 contract alone, for he has suffered only "economic" losses.' " ' ...
19 The economic loss rule requires a purchaser to recover in
20 contract for purely economic loss due to disappointed
21 expectations, unless he can demonstrate harm above and beyond
22 a broken contractual promise. [Citation.] Quite simply, the
23 economic loss rule 'prevent[s] the law of contract and the law of
24 tort from dissolving one into the other.' [Citation.]" *Robinson
Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.

25 Further, the *Food Safety* Court explained "a party alleging fraud or deceit

26 Prof. Code § 17200.

27 ⁴ LookSmart concedes that Weboost can maintain a cause of action for breach of contract which
28 is subject to the limits of liability set forth in the Contract.

1 in connection with a contract must establish tortious conduct independent of a
2 breach of the contract itself, that is, violation of ‘some independent duty arising
3 from tort law.’” *Food Safety Net Services* 209 Cal.App.4th at 1130.

4 WeBoost has pleaded and the Contract establishes that the payments due
5 under the Contract would be determined on a “pay-per-click” basis. *See*
6 Complaint ¶ 17 and Ex. A. The Contract also establishes that the pay-per-click
7 “charges will be determined solely based on LookSmart’s click tracking
8 technology.” *See* Complaint Ex. A, Pg. 3 Section C, “All Accounts”. Furthermore,
9 the Contract contemplates challenging the pay-per-click charges that are invoiced
10 by LookSmart and has a reconciliation system in place to do so. *Id.* WeBoost did
11 not utilize the reconciliation system. Instead, it filed this action and alleged that
12 what “WeBoost was paying LookSmart [for] was not legitimate pay-per-click
13 traffic at all but rather illegitimate ‘click-fraud’.” *See* Complaint ¶ 39. This
14 allegation forms the basis of WeBoost’s breach of contract claim. *Id.*
15 Furthermore, this same allegation of illegitimate pay-per-click charges, which
16 WeBoost calls “click-fraud”, is the basis of every cause of action stated by
17 WeBoost. *See* Complaint ¶¶ 30, 32, 36, 39, 40, 49, 56, 59, 63 and 67.

18 Thus, WeBoost does not even allege tortious conduct independent of a
19 breach of the contract. Every cause of action arises from the same allegation of
20 breach of contract via illegitimate pay-per-click charges, which WeBoost calls
21 “click-fraud” in an attempt to dissolve the law of contract and the law of tort into
22 the other. *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.

23 The *Food Safety* Court explained “[e]ven if Eco Safe’s evidence raises
24 triable issues whether the study contains inaccuracies or falsehoods, they are not
25 ‘conceptually distinct from the contract,’ as Food Safety’s obligation to perform
26
27

1 the tests and report the results arose exclusively from the contract.” *Food Safety*
2 *Net Services* 209 Cal.App.4th at 1130. The same conclusion applies here.

3 LookSmart’s obligation to determine the pay-per-click charges arose
4 exclusively from the Contract. Even if the pay-per-click charges contained
5 inaccuracies or falsehoods, they were not conceptually distinct from the Contract.
6 In fact, the Contract had in place a reconciliation system to rectify any inaccuracies
7 or falsehoods. As such, the contracting parties clearly contemplated that problems
8 could arise in the calculation of the pay-per-click charges in the Contract and
9 therefore those problems only amount to a breach of contract. These contemplated
10 problems certainly do not amount to tortious conduct independent of a breach of
11 the contract. For these reasons, WeBoost’s alleged “click-fraud” falls within the
12 scope of the economic loss rule and bars all of WeBoost’s causes of action except
13 for the breach of contract cause.

14 **III. UNITED GUARANTY MORTGAGE INDEMNITY CO. V.**
15 **COUNTRYWIDE FINANCIAL CORP.**

16 *Food Safety* is not the only case that reached the conclusion that
17 sophisticated parties could not avoid agreed upon contract terms by asserting that
18 Cal. Civ. Code § 1668 nullifies their agreement. In *United Guaranty Mortgage*
19 *Indemnity Co. v. Countrywide Financial Corp.* (C.D.Cal.2009) 660 F.Supp.2d
20 1163, the United States District Court applying California law held that the
21 economic loss rule to prevented sophisticated business entities (an insurer and a
22 bank), who had agreed to contractually handle claims fraud by the bank, from
23 avoiding the terms of the agreement based on Cal. Civ. Code § 1668⁵. The Court
24 ruled as follows:

26 ⁵ United Guaranty, like WeBoost, also asserted a Cal. Bus. & Prof. Code § 17200 cause of action
27 which was dismissed by the Court. *Id.* at 1192.

1 the Master Policy expressly provides for claims “fraud” and
2 provides remedies for claims fraud. Section IV.D.4 (discussing
3 the policy provisions). Again, California has a strong policy in
4 favor of allowing contracting parties to define and limit their risk
5 exposure. Here, sophisticated business entities agreed to
contractually handle claims fraud by the insured. These contract
terms therefore subsume any tort remedy for claims fraud.

6 *Id.* at 1188.

7 Here, the Contract expressly provided for illegitimate pay-per-click charges,
8 which WeBoost calls “click-fraud”, and remedies for the “click-fraud”. This Court
9 should also apply California’s strong policy in favor of allowing contracting parties
10 to define and limit their risk exposure. The Court should enforce the Contract’s
11 limitation of liability and find that the limitation of liability and the economic loss
12 rule bar all of WeBoost’s claims except the breach of contract, subject to the
13 limitation of liability.

14 **IV. THE CONTRACT’S LIMITATION OF LIABILITY IS NOT**
15 **AMBIGUOUS**

16 WeBoost claims that the Contract’s “Limitation of Liability” provision is
17 ambiguous and that the Contract does not eliminate its right to pursue tort claims,
18 but only limits “recovery of damages, regardless of which cause of action gives
19 rise to such damages.” Opp. 4:3.

20 As discussed above and in the moving papers, at least two Courts have
21 found that virtually identical “Limitation of Liability” provisions were not
22 ambiguous and enforced those provisions. *McCarn v. Pacific Bell Directory* (1992)
23 3 Cal.App.4th 173, 177; *Food Safety Net Services v. Eco Safe Systems USA* (2012)
24 209 Cal.App.4th 1118, 1126. This Court should do the same.

25 WeBoost does not dispute that the Contract bars all claims for “INDIRECT,
26 INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES

1 (EVEN IF SUCH DAMAGES ARE FORSEABLE AND WHETHER OR NOT
2 THE INDEMNIFIED PARTY HAS BEEN ADVISED OF THE POSSIBILITY
3 OF SUCH DAMAGES) ARISING FROM” the Contract. Nor does it dispute that
4 the Contract limits the parties’ liability to “THE TOTAL AMOUNT PAID OR
5 PAYABLE (PLUS APPLICABLE FEES AND COSTS) TO LOOKSMART
6 UNDER” the Contract. Putting form over substance, WeBoost contends that those
7 terms do not eliminate its right to pursue tort claims, but only limits “recovery of
8 damages, regardless of which cause of action gives rise to such damages.” Opp.
9 4:3. WeBoost, thus, agrees that if the limitation of liability provision is
10 enforceable that it would only be able to recover damages up to the limits set forth
11 in the Contract.

12 As discussed above, even if WeBoost’s interpretation of the Limitation of
13 Liability clause is correct, California’s economic loss rule prevents WeBoost from
14 asserting tort claims that arise exclusively out of a breach of contract and thus
15 WeBoost can only maintain a claim for breach of contract as a matter of law. *Food*
16 *Safety Net Services v. Eco Safe Systems USA* (2012) 209 Cal.App.4th 1118; *United*
17 *Guaranty Mortgage Indemnity Co. v. Countrywide Financial Corp.* C.D.Cal.2009)
18 660 F.Supp.2d 1163.

19 Additionally, as discussed below, this Court should enter a partial summary
20 judgment order limiting WeBoost’s recovery, if any, to “THE TOTAL AMOUNT
21 PAID OR PAYABLE (PLUS APPLICABLE FEES AND COSTS) TO
22 LOOKSMART UNDER,” \$105,273.92. *See* Complaint ¶ 17 and Ex. B. Such an
23 order would bar WeBoost recovery of its currently pleaded prayer for
24 “Compensatory damages in an amount sufficient to compensate WeBoost for its
25 monetary losses, Restitution and Exemplary damages” and make this argument
26 moot. *See* Complaint, Prayer.

1
2 **V. THE CONTRACT'S INDEMNIFICATION PROVISION DOES**
3 **NOT COVER WEBOOST'S ALLEGED LOSSES**

4 The limitation of liability provision of the Contract provides that it applies
5 "except with respect to obligations under Sections 9 and 12" of the Contract.
6 WeBoost contends that the limitation of liability does not apply because the
7 Section 9 "Indemnification" provision applies. Based upon the facts as plead by
8 WeBoost, the Section 9 "Indemnification" provision does not apply and the
9 limitation of liability must be applied.

10 Section 9 of the Contract provides that "each party agrees to indemnify,
11 defend and hold harmless the other party, . . . from any and all liability, damages
12 and settlements due to third parties' claims or causes of action . . ." *See Complaint*
13 *Ex. A, Pg. 2.*

14 WeBoost's pleading establishes that no "third parties' claims or causes of
15 action" were asserted against WeBoost. WeBoost alleges that it paid LookSmart
16 \$105,273.92 for placing its advertisements. *See Complaint* ¶ 17 and *Ex. B.*
17 Further, WeBoost alleges that it turned around and sold the advertisements it
18 purchased from LookSmart to Google and was subject to over \$400,000 in
19 "unilateral deductions" from its Google AdSense account because of the quality of
20 the advertisement postings. *See Complaint* ¶ 24. Google did not assert "claims or
21 causes of action" against WeBoost. Google never even paid WeBoost the
22 purported \$400,000 and/or recovered those alleged funds from WeBoost. By
23 WeBoost's own admission Google just recalculated what WeBoost had earned
24 pursuant to their AdSense contract and paid WeBoost that amount. Not only did
25 Google not assert "claims or causes of action" against WeBoost, WeBoost never
26 suffered "liability, damages and/or paid any settlements". The Contract's Section
27 9 "Indemnification" provision is not applicable to the facts as alleged by WeBoost

1 and the limitation of liability must be applied.

2
3 **VI. WEBOOST HAS NOT OPPOSED LOOKSMART'S MOTION FOR**
4 **PARTIAL SUMMARY JUDGMENT**

5 LookSmart entitled its motion and notice **"DEFENDANT'S MOTION TO**
6 **DISMISS OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY**
7 **JUDGMENT."** Furthermore, the Notice stated LookSmart "hereby moves
8 pursuant to Rule 12(b)(6), or in the alternative Rule 56 of the Federal Rules of
9 Civil Procedure" and sought an "order limiting the parties' liability to the total
10 amount Plaintiff WeBoost paid LookSmart under the contract." The memorandum
11 of points and authorities separately set forth the legal standard for summary
12 judgment and requested an "order limiting WeBoost's recovery, if any, to an
13 amount less than or equal to \$105,273.92 on its remaining Breach of Contract
14 claim." Moreover, the argument section also stated that "Summary judgment for
15 the moving party is proper when a rational trier of fact would not be able to find
16 for the nonmoving party on the claim, claims and/or damages at issue. *Matsushita*
17 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)."

18 WeBoost did not oppose LookSmart's motion for partial summary judgment
19 and instead chose to argue that "a motion to dismiss is not the proper mechanism
20 for attempting to limit [its] damages." Opp. 8:14.

21 When a party fails to address the moving party's assertions of fact as
22 required by Rule 56(c) of the Federal Rules of Civil Procedure, the court may
23 consider the moving party's facts undisputed (i.e., deemed admitted) for purposes
24 of the motion. *Id.* If the undisputed facts and other supporting materials show the
25 moving party is entitled to judgment as a matter of law, the Court should grant
26 summary judgment. *See Beard v. Banks* (2006) 548 US 521, 527 (decided under
27 former Rule).

1 Here the undisputed facts establish that the Contract's limitation of liability
2 provision is valid and enforceable. Therefore, LookSmart respectfully requests
3 that the Court enter an order limiting WeBoost's recovery, if any, to an amount
4 less than or equal to \$105,273.92.

5 **VI. CONCLUSION**

6 LookSmart respectfully requests that the Court dismiss with prejudice
7 WeBoost's claims for Breach of the Covenant of Good Faith and Fair Dealing,
8 Fraudulent Concealment, Negligent Interference With Prospective Economic
9 Advantage, Intentional Interference With Prospective Economic Advantage,
10 Intentional Interference With Contractual Relations and Violation of Cal. Bus. &
11 Prof. Code § 17200 and issue and order limiting WeBoost's recovery, if any, to an
12 amount less than or equal to \$105,273.92 on its remaining Breach of Contract
13 claim.

14 **RIMAC MARTIN, P.C.**

15 Dated: January 24, 2014

16 By: /s/ William Reilly

17 Attorneys for Defendant

18 LOOKSMART LTD

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CERTIFICATE OF SERVICE